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AN OVERVIEW OF THE LAW AND PRACTICE OF THE FREEDOM OF INFORMATION ACT IN NIGERIA: LESSONS FROM UK AND GHANA

By

Prof. Nlerum Sunday Okogbule*
Bariyima Sylvester Kokpan, PhD**[1]

Abstract

The Freedom of Information Act, 2011(FOIA) is over 12years old in Nigeria. The enactment of the law attracted so much interest, particularly from members of the Non-Governmental organizations and civil societies. It would appear that the Act suffers from some legislative gap capable of resulting in abuse by mischievous applicants. The FOIA in breach of the provisions of the CFRN declared itself superior to every other law. Another challenge in the FOIA giving rise to abuse is the unbridled right vested in an applicant to ask for information and public records without indicating his reason or interest in the information sought. The FOIA imposed impracticable and unrealistic timelines on public officials without considering the usual administrative procedures/bottlenecks in most government offices. Furthermore, this paper found that there is a lack of clarity on the provisions of the FOIA dealing with privacy right. The FOIA, though intended to be a public interest legislation expropriates so many other subject matter from disclosure to the applicants. The paper thus recommends the balancing of public, private, security and government interest for effective enforceability. It is further recommendation that the need to harmonize the provisions of the FOIA with other related extant legislations, including the recently enacted Nigeria Data Protection Act 2023 cannot be overemphasized.

Keywords: *Access, Public records, Public Interest, Constitutional Supremacy and Data Protection.*

1.0 Introduction

This paper is an overview of the primary law on access to public information in Nigeria, that is, the Freedom of Information Act, 2011 hereinafter referred to as FOIA. The enactment of the law attracted so much interest, particularly from members of the Non-Governmental organizations and civil societies. However, it would appear that the Act suffers from some legislative gap capable of resulting in abuse by mischievous applicants. The paper further considered the provisions of similar laws in other jurisdictions outside Nigeria with a view to possibly draw lessons for Nigeria.

The FOIA provides that it have superior and overriding powers over every other statutes.[2] It also provides that an applicant need not indicate reason for requesting for access to information from public office.[3] In practice, this seems to have created a window for abuse by some mischievous applicants.[4]

[1] * Nlerum Sunday Okogbule is a Professor of International Human Rights Law with the Faculty of Law, Rivers State University, Port Harcourt, Nigeria.
**Dr. Bariyima Sylvester Kokpan is a Senior Lecturer with the Department of Jurisprudence and International Law, Faculty of Law, Rivers State University, Port Harcourt, Nigeria. He can be reached at bariyima.kokpan@ust.edu.ng or 0803 875 6092.
[2] FOIA, s.1(1). Cf, s. 30(1) of the same FOIA that purport to modify the supremacy clause.
[3] Ibid, s.1(2).
[4] *Aviomoh vS. COP [*2022] 4 NWLR (PT. 1819) 69.

One issue has remained unsettled since the enactment of the FOIA. That is the issue of the scope and extent of the applicability of the law. Diverse interpretations of courts decisions on the extent of applicability of the Act have not helped matters. Nigeria is a federal state with shared responsibilities among the tiers of government to *wit*, federal, state and local governments. As shall been seen later in this paper, some of the decisions of the court are to the effect that each of the states of the federation need to specifically domestic the FOIA since the National Assembly lack the locus to make laws for the states of the federation.[5] Another set of judgments are to the effect that the FOIA contains sweeping provisions making it applicable to all states without the further requirement of states domestication. [6]

The issue of the scope and extent of the applicability of the FOIA is pivotal to determine if an applicant's right to access public information from a state government exist, especially where the state is yet to domesticate the FOIA.[7] If the FOIA is applicable to only federal public offices, it means access to information on the activities of states is limited to only those states that have domesticated the FOIA. The imperative of this enquiry is further strengthened by the absence of any clear provision in the FOIA expressly making it applicable to either federal or state public offices. The only guide as to the extent of its applicability is the fact that the FOIA was made by the National Assembly.

Additionally, the FOIA requires that information be provided within seven days from the receipt of the request. In practice, it has been shown to be practically impossible for some government offices to meet these timelines considering the natural bureaucracies in those offices. The FOIA further empowers applicant to resort to litigation where public offices fails or is unable to grant access to the information/ records as requested. In one breath, the FOIA permits disclosure of certain personal information of public employees, including matters of their salaries and emoluments.[8] This appears to contradict the provisions of the Nigeria Data Protection Act of 2023, which among others requires the consent of the employees before the granting of such disclosure.

This paper is intended to examine the above highlighted issues with a view to making proposals to reform the regime of access to public records in Nigeria. The paper shall draw some guides from the extant regimes applicable in the USA, Great Britain and Ghana.

2.0 Access to Public Information in Nigeria

The Freedom of Information Act 2011 is the principal law specifically addressing issues of access to public information in Nigeria. Former President Goodluck Ebele Jonathan signed the 32-sections Bill into law on the 28th day of May 2011. The Act guaranteed the right to access or request any information or record that is in the custody or possession of any public institution or private bodies providing public services, performing public functions or utilizing public funds.[9]

Other laws touching on the right to access or deny public information in Nigeria include the Constitution of the Federal Republic of Nigeria, the Official Secrets Act, 1962 the Criminal Code, Cap C 38, LFN

[5] *Sun Publishing Ltd. vs. Aladinma Medicare Ltd*. [2016] 9 NWLR (PT. 1518) 557.
[6] *General India Garba v. Commissioner of Finance Benue State,* Suit No. MAC/2564/M/2012.
[7] Ibid.
[8] FOIA, s.3(d) vi-vii.
[9] Guidelines On The Implementation Of The Freedom Of Information Act 2011 Freedom Of Information Act 2011 Revised Edition 2013, Published Under The Authority Of Published Under The Authority Of The Honourable Attorney General The Honourable Attorney General Of The Federation And Minister Of Justice, March 29th 2013.

2004, and the Penal Code, Cap P 53, 2004. Others include the Armed Forces Act, A20 LFN, 2004; United Nations Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights (ICCPR), 1976; African Charter on Human and Peoples' Rights 1981 and most recently the Nigeria Data Protection Act, 2023.

On 14 June 2023, President Bola Ahmed Tinubu signed into law, the Nigeria Data Protection Act, 2023. The objective of the Act, amongst others, is to safeguard the fundamental rights and freedoms and the interests of data subjects as guaranteed under the 1999 Constitution of Nigeria. The Act establishes the Nigeria Data Protection Commission (NDPC), also referred to as the "Commission", to replace the Nigeria Data Protection Bureau (NDPB) established by former President Muhammadu Buhari in the year 2022.[10] As noted earlier, the focus of this paper is on the FOIA, 2011.

The principle of the FOIA is founded on the provision of section 39 of the Constitution of the Federal Republic of Nigeria, 1999 as amended, which provides for the right to freedom of expression. The said section 39 is however concomitant with section 37 of the same Constitution that deals with the right to private and family life.

Section 39(1) CFRN provides that "every person shall be entitled to freedom of expression, including freedom to hold opinions and to receive and impart ideas and information without interference". The operative words in the context of this paper is *'to receive…information without interference'*.

However, the freedom of expression and the press as provided in section 39 is not unlimited because section 39(3) of CFRN validates any law that is reasonably justifiable in a democratic society preventing the disclosure of confidential information, officials of federal or state government or members of the security services established by law from divulging official information. More importantly, section 45 of the CFRN provides another set of circumstances when the right to expression/press as well as privacy shall be suspended. These conditions include when it would not be in the interest of defence, public safety, public order, public morality or public health or the need for the protection of the rights and freedom of other persons to enforce the rights. Ironically, the CFRN and the Interpretation Act[11] does not contain a definition of 'public order' as used in section 39 of the CFRN.

Nonetheless, the United States Institute of Peace[12] define 'public order' as a condition characterized by the absence of widespread criminal and political violence, such as kidnapping, murder, riots, arson, and intimidation against targeted groups or individuals. Oxford Dictionary[13] defines public order as the absence of violent disorder, threatening behaviour and disorderly conduct. Black'sLaw Dictionary[14] defines it as the state of normality and security needed in society. The implication of all these is that the right to expression could be limited to avoid public disorder or crisis. Jurisprudentially, the right to privacy and family life guaranteed in section 37 of the CFRN creates a limitation to the freedom of

[10] John Anyanwu & Ola Agbaje, Nigeria Data Protection Act Review available atnigeria-data-protection-act2023_kpmg-review.pdf last accessed 2nd December 2023.
[11] Interpretation Act, s. 18.
[12] Public Order | United States Institute of Peace (usip.org) accessed 2nd December 2023.
[13] Public order - Oxford Reference.
[14] B. A. Garner, Black'slaw Dictionary, 11th edition, 1189.

expression and the press and this is reinforced by the provision of section 45(1) (b) CFRN on the need to protect the rights and freedom of others.[15]

This paper had delved into these constitutional provisions to demonstrate the dominance, superiority and overriding effect of Nigerian constitution over every other law, persons and authorities. Section 1(1) declares that the CFRN is supreme and its provisions shall have binding force on all authorities and persons throughout Nigeria. Section 1(3) clarifies that "if any other law is inconsistent with the provisions of this Constitution, this constitution shall prevail, and that other law shall to the extent of the inconsistency be void". Put differently, any law, no matter how well intended, that is inconsistent with any of the provisions of the CFRN shall to the extent of that inconsistency be a nullity. This is a settled law in Nigeria requiring no further argument.[16]

As noted above, other regional and international instruments propel the objectives of the FOIA. For example, article 19 of the Universal Declarations of Human Rights provides that 'everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Article 9 of the African Charter on Human and Peoples Rights, provides that 'every individual shall have the right to receive information; (2) every individual shall have the right to express opinions within the Law.' The African Commission on Human and People's Rights' adopted a Declaration of Principles on Freedom of Expression in Africa,[17] stating: 'Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law. The Declaration,[18] being a soft law document that interprets Article 9 (right to receive information and free expression) of the African Charter on Human and Peoples' Rights, consists of 43 principles, including principles on access to the internet, internet intermediaries, privacy protections, and communication surveillance, as well as on the Declaration's implementation.[19]

Having established the foregoing background, this paper shall now examine specific provisions of the FOIA 2011. The FOIA generally guaranteed the rights of citizens to access public records and information from public institutions.

3.0 The Preamble

The preamble to the FOIA provides the overall objectives as follows:
An Act to make public records and information more freely available, provide for public access to public records and information, protect public records and information to the extent consistent with the public interest and the protection of personal privacy, protect serving public officers from adverse consequences for disclosing certain kinds of official information without authorization and establish procedures for the achievement of those purposes and for related matters.

[15] See *Aviomoh vs. C.O.P* [2022] 4 NWLR (Pt. 1819) 69 SC.
[16]. See *Yantaba vs. Governor of Katsina State* [2022] 1 NWLR (Pt. 1811) 259 SC; *Onwuakpa vs. Onyeama* [2022] 17 NWLR (Pt. 1858) 97 SC; *A.P.C vs. E.S.I.E.C* [2021] 16 NWLR (Pt. 1801) 1 SC.
[17] Adopted during its 65th Ordinary Session held in November 2019.
[18] ACHPR, *Declaration of Principles of Freedom of Expression and Access to Information in Africa* (2019).
[19] New ACHPR Declaration on Freedom of Expression & Access to Information – International Justice Resource Center (ijrcenter.org) last accessed 2nd December 2023.

The following concepts can be deduced from the preamble to the FOIA, that is to say, i. Public records and information ii. Public access to public records and information, iii. Protection of public records and information, iv. Protection of public interest, v. Protection of personal privacy, vi. Protection of public officers, and vi. Procedural issues.

Furthermore, the above concepts and the entire gamut of the FOIA could be safely subsumed under the following broad categorizations:

a. Right of persons to access public records/information
b. Duty on public institutions to provide information
c. Right of public institutions to deny access to public information

3.1 Right of Persons to Access Public Records and Information

Sections 1, 2 and 3 of the FOIA 2011 provide for the rights of any person to access public information. Specifically, s.1(1) provide that the right of any person to access or request information, whether or not contained in any written form, which is in the custody or possession of any public official, agency or institution howsoever described, is established. It is submitted that this provision will only apply where the Applicant is able to demonstrate that the information is in the custody or possession of any public official or institution**.**

In *Elukpo vs. Med. Director Federal Medical Centre Lokoja*,[20] the case of the Appellant/Applicant was dismissed by the Court of Appeal because of his inability to convince the court that the document/information sought for was in the possession of the respondent. Without prejudice to the definition of 'public record or document' in section 31 and the provision of s.3(2) of the FOI Act, it is further submitted that the applicant must show that the public institution is in physical as against constructive possession. Merely being in control does not suffice, as control does not *ipso facto* translate to accessibility.

Furthermore, sections 2 and 3 provide that a person who have right to apply for information also has a right of access to court by instituting an action for mandamus in court. In other words, a person seeking information may apply orally,[21]in writing[22] and by filing of action in court.[23] These provisions demonstrate the clear intention of the FOIA to enable applicants enjoys unhindered access to public information/record of their choice.

3.2 Duty on Public Officials/Institutions to Disclose Information

A duty is an obligation that is owed or due to another person that needs to be satisfied or performed for the benefit of the other.[24] Duty could be legal when it is prescribed by the law of a country or those

[20] [2022] 3 NWLR (Pt. 1816)183.
[21] FOIA, s. 3(4).
[22] Ibid at s.3(1)(2).
[23] Ibid, s.1(3), 2(6),
[24] Kent Greenawalt, The Natural Duty to Obey the Law, 84 MICH. L. REV. 1 (1985). Available at: https://repository.law.umich.edu/mlr/vol84/iss1/2.

arising from the operation of the law.[25] Other types of duty include religious, absolute, positive, negative, and moral duties.[26]

The FOIA imposes legal and positive duties on public officials/institutions. The law further direct that the duty could be discharge in two ways to *wit; suo motu* (voluntary) or upon application by any person.

Section 2(3) FOI Act imposes a duty on public institutions to *suo motu* publish the following information in accordance with subsection (4) of the section:

A description of the organization and responsibilities of the institution including details of the programmes and functions of each division, branch and department of the institution; (b) a list of all - (i) classes of records under the control of the institution in sufficient detail to facilitate the exercise of the right to information under the Act, and (ii) manuals used by employees of the institution in administering or carrying out any of the programmes or activities of the institution; (c) a description of documents containing final opinions including concurring and dissenting opinions as well as orders made in the adjudication of cases; (i) substantive rules of the institution (ii) statements and interpretations of policy which have been adopted by the institution, (iii) final planning policies, recommendations, and decisions; (iv) factual reports, inspection reports, and studies whether prepared by or for the institution; (v) information relating to the receipt or expenditure of public or other funds of the institution; (vi) the names, salaries, titles and dates of employment of all employees and officers of the institution; (vii) the right of the state, public institutions, or of any private person(s) (viii) the name of every official and the final records of voting in all proceedings of the institution; (e) a list of – (i) files containing applications for any contract, permit, grants, licenses or agreements, (ii) reports, documents, studies, or' publications prepared by independent contractors for the institution, and (iii) materials containing information relating to any grant or contract made by or between the institution and another public institution or private organization; (f) the title and address of the appropriate officer of the institution to whom an application for information under this Act shall be sent, provided that the failure of any public institution to publish any information under this subsection shall not prejudicially affect the public's right of access to information in the custody of such public institution

The second duty placed on the public officials/ institutions is the obligation to disclose information as requested by applicant or refusing the application with reason or transfer it to another institution with reason.[27] The FOI Act imposed additional duty on all government or public institution to ensure the provision of appropriate training for its officials on the public's right to access information or records held by government or public institutions, as provided for in the Act and for the effective implementation of this Act.[28]

Clearly, the right of anyone to access information from public offices and officials is made subject to the provisions of section 6, 7, 8 of the Act. The implication is that the right to disclose information to

[25] Acharya, Suman and Acharya, Suman, Jurisprudence of Legal Rights and Duties (April 10, 2019). Available at SSRN: https://ssrn.com/abstract=3369653 or http://dx.doi.org/10.2139/ssrn.3369653.
[26] Chris Ben, The Introduction of Duty into English Law and the Development of the Legal Subject *Oxford Journal of Legal Studies*, Volume 40, Issue 1, March 2020, Pages 158–182, https://doi.org/10.1093/ojls/gqz032.
[27] FOI Act 2011 s.5.
[28] Ibid, s.13.

applicants is not absolute because the same FOIA recognizes the right of public institutions to withhold public records/information in deserving circumstances.

3.3 Right of Public Institutions to Deny Access to Public Information

The FOI Act contain several circumstances and reasons when public institutions can refuse to disclose public information in their custody or possession even upon receipt of request. Public institutions in Nigeria has right to refuse to disclose public information in their possession. The refusal could be as to the whole of the information requested or any part thereof.[29]

Refusal to disclose information or provide record may be express or implied. A public institution will be deemed to have refused the application for access where the timeframe provided for the disclosure has elapsed.[30]

Refusal may also be lawful or wrongful. It is wrongful when the reason for the refusal is outside the scope provided by the Act. The punishment for a wrongful refusal to disclose information is a criminal conviction and a fine of N500, 000.00.[31] It is however lawful when the refusal is based on any of the expropriating provisions of the FOIA.

The FOIA used the modal verbs, *may* and *must* to demonstrate that public officials/institutions enjoys some level of discretion in the disclosure of certain public information.[32] Accordingly, a public official/institution may deny access to public information where disclosing the information will have any of the following effects;[33] i. interfere with pending or actual and reasonably contemplated law enforcement proceedings conducted by any law enforcement or correctional agency; ii. Interfere with pending administrative enforcement proceedings conducted by any public institution; iii. Deprive a person of a fair trial or an impartial hearing iv. Unavoidably disclose the identity of a confidential source; v. constitute an invasion of personal privacy under section 15 of the Act; vi. Obstructs an ongoing criminal investigation; vii. Disclosure will be injurious to the security of penal institution or facilitates the commission of an offence, and viii. cause injury to international relationship or threaten the defence of the Federal Republic of Nigeria.[34]

Similarly, sections 16, 17 and 19 of the Act contain further circumstances when public institutions/officials MAY deny an applicant access to official information/documents sought for. These further situations include refusal on ground of professional privilege such as lawyer/client;[35]

[29] Ibid, s.7(1).
[30] s.7(4).
[31] *Nyame vs. F.R.N* [2021] 6 NWLR (Pt. 1772) 289, SC; *State vs. Okechukwu* [1994] 9 NWLR (Pt. 368) 273, SC.
[32] Whether the word 'may' is discretionary or not depend on the context of usage. The general interpretation however is that 'may' when used in a statute connote permissiveness. See *Mohammed vs. State* [2018] 5 NWLR (Pt. 1613) 540 SC; *Mkpa vs. Mkpa* [2010] 14 NWLR (Pt. 1214) 612; *Ojukwu vs. Onyeador* [1991] 7 NWLR (Pt. 203) 286.
[33] FOIA, supra s.12
[34] Ibid, s.11.
[35] Nigerian Evidence Act, s.192. Cf, L. J. Savitt & F. L. Nowels, 'Attorney-Client Privilege for In-House Counsel is not Absolute in Foreign Jurisdictions', The Metropolitan Corporate Counsel, October 2007, p. 18.

health/patients;[36] journalism,[37] etcetera; and information dealing with course or research materials prepared by faculty members or information pertaining to academic grading patterns of institution.

It is submitted that the information under permissive category as contain in sections 12, 16, 17 and 19 of the Act can be disclosed with the consent of the persons affected. These provisions among other reincarnate the provision of section 37 of the CRFN guaranteeing the right to privacy of the person. They are also in consonance with other statutory provisions regulating professional organizations such as the Legal Practitioners Act and Rules of Professional Conduct for Legal Practitioners, 2023. Similar protection are contain in sections 187 to 193 of the Evidence Act, 2011.[38]

Conversely, sections 14 and 15 of the FOIA generally forbids public officials and institutions from granting access to public records where the information has to do with files and personal information kept with respect to (a) clients, patients, residents, students, or other individuals receiving social, medical, educational, vocation, financial, supervisory or custodial care or services directly or indirectly from public institutions; (b) employees, appointees or elected officials of any public institution or applicants for such positions; (c) any applicant, registrant or licensee by any government or public institution cooperating with or engaged in professional or occupational registration, licensure or discipline; (d) information required of any tax payer in connection with the assessment or collection of any tax unless disclosure is otherwise requested by the statute; and (e) information revealing the identity of persons who file complaints with or provide information to administrative, investigative, law enforcement or penal agencies on the commission of any crime. The latter category protect public institution from divulging information on whistleblowers.

By the provision of section 31 of the Act that deals with the definition of 'personal information', it would appear that the person protected is unlikely to be a staff of the public institution in question. The definition envisages the present of a public institution such as the Code of Conduct Bureau, Independent National Electoral Commission, and Federal Judicial Service Commission being in possession or custody of information relating to another person. The logic is that the public institution obtained the information for any of the purposes aforestated and as such divulging it without the consent of the person violates privacy laws. Common examples in Nigeria include students' medical files.

It is submitted that section 14(1)(b) conflicts with section 2(3) (c) (vi) both of the FOIA which requires public institutions to publish in a document the 'names, salaries, titles, and dates of employment of all employees and officers of the institution'. Whereas the latter provision imposed a duty on the institutions, the former expropriate it saved where the interest of the public far outweighed the reason for the refusal. It would appear that by sections 2, 3 and 25 of the Nigeria Data Protection Act, 2023 public institutions would have to obtain some manner of consent from their employees before divulging personal information about their staff. The burden of proving validly obtained consent is on the institution processing the data. Additionally, the Nigeria Data Protection Act provides the boundaries

[36] Okeke, Miracle, Medical Practitioners' Duty of Confidentiality in Nigeria: The Legal Perspective (February 12, 2022). Available at SSRN: https://ssrn.com/abstract=4033352 last accessed 2nd December 2023.
[37] Mark Deuze & Tamara Witschge, Beyond Journalism: Theorizing the Transformation of Journalism, Journalism (Lond). 2018 Feb; 19(2): 165–181.
[38] Compare however section 22 FOI Act that purports to override the provision of the Evidence Act 2011 on privileged communication.

of applicability by exempting activities carried out solely for personal or household purposes and various activities carried out by competent authorities. The Act also empowers the Commission to create further exemptions by regulation.[39]

Furthermore, section 15 of the FOI Act contained another category of information to be excluded from disclosure by public institutions. *A public institution shall deny an application for information that contains: (a) trade secrets and commercial or financial information obtained from a person or business where such trade secrets or information are proprietary, privileged or confidential, or where disclosure of such trade secrets or information may cause harm to the interests of the third party provided that nothing contained in this subsection shall be construed as preventing a person or business from consenting to disclosure; (b) information the disclosure of which could reasonably be expected to interfere with the contractual or other negotiations of a third party; and (c) proposal and bids for any contract, grants, or agreement, including information which if it were disclosed would frustrate procurement or give an advantage to any person.*

Simply put, public institution should deny disclosure where disclosing the information would interfere with contractual negotiation with third party or it would frustrate procurement or bidding right or give someone else undue advantage. *Prima facie,* it would appear that section 15(1) (b) and (c) will only apply when negotiation is ongoing and that the intendment of the provision is to avert the frustration of the discussion processes. However, that may not be correct using a community reading of the section. The appropriate interpretation is that public institutions can deny disclosure under the guise of maintaining sanctity of contract with a third party, or when doing so, would violates intellectual property right.

Section 15(4) provide exceptions on grounds of public health, public safety or the protection of the environment. The benefit for the activation of the exceptions must however and comparably outweighs in all ramifications the loss to be occasioned by the denial of the information.

Section 27 of FOIA is not without reservation. It protect public officials who without appropriate authority made disclosure or grant access to public records from criminal and civil proceedings. The provision indirectly empowers employees in public office to disclose public information regardless of the position of their employer on the request. Similar protection is made for the receiver of the information. No doubt, the provision will encourage whistleblowing even as it strengthens the principle of evidence on the irrelevant of proper custody.[40]

However, the consequences of this provision may be insubordination and eventual loss of jobs even as it could breed industrial disharmony. The protection of the public officials, particularly employees under section 27 might just be a mirage.

4.0 Other Ancillary Issues

By virtue of section 10 of the FOIA, public institutions need to ensure that the document/records to be disclosed has not been willfully compromised by any of its officials before releasing it. Simply put,

[39] Anyawu, supra (n10).
[40] Compare with ss. 148-155, Evidence Act.

'working on the record' as the slang may go, before releasing it is criminalized. The assumption here is that the compromise was effected during the pendency of an application for disclosure or with knowledge of such application.[41]

Access to public records is not always free. Applicants are to require to pay fees for the application to cover sundry expenses such as photocopy.[42] Similarly, a public institution can transfer a request made to it to another institution.[43] Public institutions denying access or transferring the request to another institution is required to indicate if the record exist in the first instance and to issue a notice of denial.[44]

By the provision of section 15(3) FOIA, public institutions disclosing information relating to products and environmental testing should furnish the applicant with details of the methodology used in conducting the test.[45] Additionally, the FOIA mandates public institutions to submit annual report relating to the extent of their compliance with the law.[46] The report is to be submitted to the Honourable Attorney General of the Federation and Minister for Justice on or before the 1st day of February every year.[47] The essence of this requirement is clearly to evaluate and ensure compliance with the Act.

The office of the Attorney General of the Federation in the year 2013 in accordance with section 29(8) of the Act encouraged public institutions to designate a senior official (of at least Assistant Director Level or its equivalent) as the head of a FOIA Unit. This Unit should have direct responsibility for determinations and generally ensuring compliance through the adoption of institutional best practices in the following areas: i) Dedicated help/service lines or online assistance ii.) Undertaking periodic review of record keeping and maintenance procedures 14 iii.) Reporting and liaison with the Office of the Attorney General of the Federation iv.) Preparation of a record map/chart – v.) Compliance with the Institution's Proactive Disclosure Obligations. vi) Regular training and retraining of the staff of the institution on their FOIA related obligations.[48]

An Applicant can challenge in court the decision of public institutions denying disclosure.[49] The court has jurisdiction to review the decision to disclose the requested information.[50] A public institution exercising a right of refusal to disclose has a legal burden to justify the refusal within the context of the FOIA.[51] Proceedings relating to disclosure are to be determined summarily within 30days or such extended period. The action shall be adjudged on affidavit evidence after consideration in chambers or *ex parte*. The logic is to avoid an indirect disclosure of the information in the course of a full-scale trial in open court.[52] The court would however be bound to conduct full-scale trial if the issue before it has to do with a violation of the Act that could result in conviction and fine.

[41] FOIA, s.10.
[42] Ibid, s. 8.
[43] Ibid, s.5(1).
[44] Ibid, s.7(3).
[45] FOIA, s. 15(3).
[46] Ibid, s. 29.
[47] Ibid, s. 29.
[48] See Revised Guidelines on Implementation of the FOIA, 2011 issued by the AGF on the 29th of March 2013.
[49] FOIA 2011, s. 20.
[50] Ibid, at ss.21-22.
[51] Ibid, s. 24.
[52] See generally sections 20-24, FOIA.

The court hearing a complaint brought pursuant to the provisions of the FOI Act will in the final analysis make any of the following findings:[53] (a) That the institution has not authority to deny the information; (b) That the withholding of the information is unjustifiable in the circumstances even though the institution has right to withhold information; (c) That the information be disclosed in the greater interest of the public or (d) Any other order as the court deem appropriate.

5.0 Access to Public Information/Records in the UK and Ghana

This paper shall now briefly compare the law in Nigeria on right of access to public records with the situation in the United Kingdom, the United States of America and the Republic of Ghana.

6.0 The Practice of FOI In the United Kingdom

The law on access to public information in the United Kingdom is more flexible than Nigeria. The flexibility is found in the extent of discretion granted to public institutions and the numerous exceptions created in the Act. The principal legislation regulating access to public information in the UK is the Freedom of Information Act 2000. The Act creates a general right of access to all types of recorded information held by most UK public authorities.

By section 1 (1) a public authority would be deemed to have discharge its obligation the moment the applicant fails to provide further information as requested by it. Unlike the case of Nigeria, the public authority can demand for further information and clarifications from the applicant before proceeding to grant his request for disclosure. Accordingly, the duty of the public authority is to confirm or deny the availability of the requested information.[54]

Similarly, sections 21, 23, 32, 34, 36, 40, 41 and 44 among others contains list of subject matter on which public authority are barred from providing information, except otherwise expressly provided.[55]

Unlike the position in Nigeria, public authorities in the UK are not obligated to disclose or grant access to all information in their custody. For instance, there is prohibition on disclosure of information held by the public authority on behalf of another person.[56] What this means is that private persons' information in the custody of public authority is excluded from the FOIA in the UK. On the contrary, public office information in the custody[57]of private persons can be disclosed.

The timeline in the UK for disclosing the information is 20 working days as against the general seven working days in the Nigeria's law.[58] Furthermore, the UK law direct public authorities to direct their communication in the manner requested by the applicant, except where it is practically impossible. In situation where the request is for money, the public authority may refuse where the cost of producing the information may be higher than the amount in question.[59]

[53] Ibid s.25.
[54] UK Freedom of Information Act, 2000, s.1(6).
[55] Ibid, s.2(3).
[56] Ibid, s.3(2).
[57] Ibid, s.11(1).
[58] Supra at s.10.
[59] Ibid, s.12.

Notably, public authorities in the UK are protected from responding to vexatious and repeated request. Although the word 'vexatious' is not defined in the Act, but 'repeated' as the name connote means request that had been answered in recent time.[60] No such protection exist in the Nigeria FOI Act. Additionally, public authorities in the UK are generally protected against disclosing information intended for future publication or derived from programme of research.[61]

Nigeria FOIA prohibits disclosing information that would prejudice national security. However, the exclusion of security information from disclosure in the UK is more explicit and clearly well intended. The UK Act also excludes information that would prejudice the economy interest of the country, including information that would prejudice (a) the prevention or detection of crime, (b) the apprehension or prosecution of offenders, (c) the administration of justice, (d) the assessment or collection of any tax or duty or of any imposition of a similar nature, and (e) the operation of the immigration controls. It crystal clear that the FOIA in the UK does not have any superiority clause overriding every other laws in the country.[62]

Disclosure of public information relative to processes in court; capable of prejudicing audit of public account; parliamentary privileges; ministerial directive; legal opinion in government department; information that would inhibit frank and honest rendering of advice or opinion to the government; Royal and Sovereign communication; health and safety and information capable of violating personal data law are all generally excluded in the UK.[63]

It is necessary to note that the UK FOIA do not allow applicants to flood the court with litigation because of denied information. Consequently, section 45 established a Code of Practice that consists of administrative procedure for compliance with the Act. It is the equivalent of Nigeria's section 29 but with expansive and disciplinary powers.

The procedure for implementation is that the applicant will complain to a Commissioner in charge (the equivalent of Nigeria's Attorney General of the Federation) that the public institution refused to disclose information. The Commissioner will investigate and direct as appropriate. Where the public institution still fails, the Commissioner shall certify the failure in writing and directs it to the court. The Commissioner acts as an intermediary between the applicant and the public authorities for the purposes of implementing the FOIA.[64] The court is thus clothed with jurisdiction to conduct full hearing of the facts, and if satisfied that there is a case of violation, convicts the public authority of contempt of court. Alternatively, an applicant can appeal from the decision of the Commissioner to the tribunal. The public institution can challenge the decision or notice of compliance by the commissioner. Finally, FOIA in the UK does not confer any right of action in civil proceedings in respect of any failure to comply with any duty imposed by or under the Act.

[60] Ibid, s.14.
[61] Ibid, ss. 21-22.
[62] Ibid, ss. 23, 24, 26 and 29.
[63] Ibid, ss.33-40.
[64] Ibid s.54.

7.0 FOIA in the Republic of Ghana

The current law on access to public information in Ghana is the Right to Information Act, 2019.[65] Sections 5 and 6 clearly exempts disclosure of any information that would hinder the policy, deliberation, consideration and opinions of the President, Vice President and Cabinet members. Furthermore, exclusion from disclosure include information that will be injurious to law enforcement, international relations, consultation and deliberations of public institutions, etc.

The Ghanaian law require Applicant to provide full details about themselves, including the capacity in which the application is made.[66] Every institution is required to appoint an Information Officer for the purposes of compliance with the Act.[67] By section 23, the Information Officer shall make a decision on the request within 14days of the receipt thereof, subject to further extension of time as provided in section 25.

Appeals from the decision of the Information Officer goes to the head of the particular public institution.[68] Appeals from the head of the institution goes to the High Court if it relates to state security or public interest. The proceedings of the court shall be heard in camera with the court having the power to inspect the public institution.[69] The Ghanaian Act established an independent commission known as the Information Commission to resolve all disputes arising from the implementation of the law and for effective implementation of the Act.[70]Every dissatisfaction arising from application for disclosure goes to the Commission except those dealing with state security as noted above which is for the High court.

8.0 Challenges to Effective Implementation of FOIA 2011

From the above discussions, it would appear that the FOI Act in Nigeria is a piece of 'unregulated regulation' lacking in clarity and precision. It represents an intention to overreached other laws in the country, without prejudice to the original intendment of the law.

i. Sweeping Provisions of The Act

The FOIA in Nigeria contains sweeping provisions declaring it to have overriding powers. Every statute has its focus and an attempt by the FOIA to overreach other statutes is enough disincentive for compliance. The CFRN, the Official Secrets Act, Public Officers Protection Act, Evidence Act and lately Nigeria Data Protection Act are examples of laws that are distinct and can exist conveniently with the FOIA in the interest of government, the citizens and society. A strict construction of some of the provisions of the FOIA would defeat the potency of the other laws, with negative consequences.

ii. Jurisdictional Issue

The FOIA 2011 is unclear as to its scope of operation. This resulted in confusion regarding the extent of its applicability. Not being on the same pedestal with the CFRN, Nigerians were confused whether the Act apply to both states and federal government offices. This is regardless of the clear provision of Part II of the Second Schedule to the CFRN, particular paragraphs 4 and 5 respectively that, gives the

[65] The 86 sections Act was passed into law on the 21st of May 2019.
[66] Ibid, s. 16.
[67] Ibid, s.19.
[68] Ibid, s.31.
[69] Ibid, s.37.
[70] Ibid, sections 40-52.

States powers to enact their own laws. This apprehension would have been avoided if the FOIA had clarified the scope of its application *ab initio.*

iii. Uncoordinated Enforcement Mechanism

The FOIA 2011 simply creates a relationship between an applicant requesting for information and the public institutions. This relationship in practice is sour in most cases because of 'emotional attachment'. Public institutions sees these applicants 'as troublesome interlopers' resulting in the public offices adopting some level of protective/defensive mechanism. There are mischievous applicants as well that uses the FOIA as a tool for harassing public institutions. Having a central coordinating agency of government for the processing of these applications would reduce the tension between applicants and public institutions, and enhance effective compliance with the law.

iv. Delay in Litigation

The FOIA creates right of access to court, particularly in favour of applicants for public access to public records. A discontented applicant has the right to seek judicial remedy the moment his application is refused. Litigations in Nigeria' court sometimes last over two decades. Resort to litigation rather than an administrative office will threaten effective implementation. Providing for administrative procedures for the resolution of disputes arising from requests will encourage compliance.

9.0 Recommendation

Consequently, this paper recommends as follows:

1. Administrative Offices for Enforcement

The FOIA 2011 should be amended to establish a central processing office to receive and process requests on access to public records. Applicants should be required to demonstrate some level of interest in the subject matter of the application or be made to file an affidavit of good faith in support of their application.

2. Creation of ADR Mechanism

An Alternative Dispute Resolution mechanism, such as Negotiation, Conciliation or Arbitration should be created to resolve dispute arising from compliance with the law. Recourse to litigation should be a last remedy. ADR mechanisms save time and resources as well as restore relationship.

3. Clarification on the Scope of the Legislation

The law should be amended to clarify that it applies to federal offices only. There is no need to exclude judicial records from disclosure matter except when the matter is *sub-judice.*

4. Regard to Other Statutes such as Security and Privacy Law

Section 1(1) and the overriding provisions in the Act should be amended to have regard to constitutional provisions and other extant laws. By the provisions of the Nigeria Data Protection Act 2023, citizens now enjoy certain rights that are actionable in the event of breach. Similarly, the Act should be amended to moderate and discourage mischievous applicants and vexatious applications.